Editor's note: appealed - aff'd, sub nom. McCracken v. Watt, Civ.No. C81-0212 (D.Wyo. June 30, 1982); aff'd in part, rev'd in part, No. 82-2049 (10th Cir. Nov. 7, 1983); 721 F.2d 694, cert denied, 104 S.Ct. 2347, 466 US 972 (May 14, 1984); also appealed - aff'd, sub nom. Geosearch v. Watt, Civ.No. 81-0215 (D.Wyo. June 30, 1982); same appeal history as McCracken v. Watt.

INEXCO OIL CO. ET AL.

IBLA 81-29 Decided April 28, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, canceling oil and gas lease W 60047.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First-Qualified Applicant

   When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.5(b).

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First-Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7.

3. Equitable Adjudication: Generally--Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas Leases: Applications: Generally

The Department is not estopped from rejecting an oil and gas lease offer, or canceling a lease issued pursuant thereto, because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.

4. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Bona Fide Purchaser

A party which purchases a first-drawn simultaneous noncompetitive DEC lease offer is a bona fide purchaser of this interest where, at the time it agreed to purchase the offer, BLM's case records contained nothing to indicate that the DEC was defective or that a protest

against the offer was ongoing, or in prospect; and where, at the time it consummated the agreement by payment of consideration, these records showed that BLM had proceeded to issue the lease, thus indicating that there was no defect in the offer, provided that the purchaser had no actual knowledge of any defect in the offer or the resultant lease.

5. Oil and Gas Leases: Bona Fide Purchaser--Oil and Gas Leases: Cancellation--Oil and Gas Leases: Overriding Royalties

An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b).

APPEARANCES: Wallace G. Malone, Esq., Houston, Texas, for Inexco Oil Company; David B. Kern, Esq., Milwaukee, Wisconsin, for Janet E. MacCracken and Resource Service Company, Inc.; Melvin E. Leslie, Esq., Salt Lake City, Utah, for Geosearch, Inc.; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On June 27, 1977, Janet E. MacCracken filed a simultaneous noncompetitive drawing entry card (DEC) oil and gas lease offer with the Wyoming State Office, Bureau of Land Management (BLM), for parcel WY 149 in the July 1977 drawing. The card was completely and, apparently, properly filled out; and it bore the signed affirmation that MacCracken was the sole party in interest in the offer and the lease, if issued.

On August 24, 1977, BLM issued a lease to MacCracken. On September 30, 1977, Inexco Oil Company (Inexco) filed an assignment of 100 percent of MacCracken's "title interest" to it for BLM's approval. The assignment form indicated that she had executed the assignment to Inexco on August 5, 1977, and that she had retained an "overriding royalty interest" of 5 percent, i.e., she had retained an entitlement to 5 percent of the proceeds of any production which might be realized from the lease.

On November 9, 1977, Fred L. Engle, d.b.a. Resource Service Company (now Resource Service Co., Inc.) (RSC), filed an assignment of a percentage of this overriding royalty from MacCracken to himself. BLM took no action to approve this assignment, because, as it has subsequently explained, it does not approve or disapprove assignments of such interests, but merely places notices thereof in its records.

On October 27, 1978, Geosearch, Inc. (Geosearch), filed a protest against the continued validity of two leases, including W 60047. Geosearch asserted an interest in the matter based on an agreement with Yole Antongiovanni, whose DEC for this parcel had been drawn with second priority in the July 1977 drawing. Antongiovanni apparently agreed to assign to Geosearch a percentage of whatever rights she still held to receive the lease.

Geosearch's protest asserted that BLM had issued this lease to MacCracken in violation of 43 CFR 3100.0-5(b), 3102.7, and 3112.5-2, in that Fred Engle had had an interest in MacCracken's offer at the time it was filed, which was not disclosed, and which effectively and illegally gave Engle an increased chance of success in the drawing. Geosearch sought a cancellation of all lease interests, including overriding royalty interests, remaining in the hands of persons who were not bona fide purchasers, and requested that BLM issue such interests to it as the successor second drawee. BLM dismissed this protest on November 1, 1978, noting that the lease had been assigned to Inexco effective October 1, 1977, and stating that it believed that the second drawee (Antongiovanni) had no interest left to assign to Geosearch.

On appeal to this Board, we vacated BLM's denial of Geosearch's protest, noting that Antongiovanni's offer remained viable, as BLM had never rejected it. Geosearch, Inc., 40 IBLA 397, 398 (1979). We also remanded the matter to BLM to join Inexco to the protest proceeding in order to give it the opportunity to show that it held and acquired MacCracken's lease interest as a bona fide purchaser, and to allow Geosearch to present prima facie evidence to the contrary, as provided in 43 CFR 3102.1-2(c). Id. at 399.

On May 18, 1979, shortly after we issued Geosearch, Inc., supra, Inexco filed information with us in which it asserted that it was a bona fide

purchaser of MacCracken's offer and lease within the meaning of 43 CFR 3102.1-2. Inexco noted that, when it purchased MacCracken's offer in August 1977, it had no notice, constructive or otherwise, that any other party had had an interest in this offer. It stressed that BLM's records afforded it no way of discovering any defect in her DEC. Accordingly, Inexco requested that it be dismissed from the proceedings as a bona fide purchaser.

On July 9, 1979, BLM officially joined Inexco to the proceedings and afforded it the opportunity to supplement the material it had filed earlier. On August 6, 1977, Inexco did so, filing documentation of its negotiations with MacCracken for the purchase of her lease. On October 17, 1979, BLM advised Geosearch that it must present prima facie evidence refuting Inexco's bona fides within 60 days.

On May 29, 1979, RSC petitioned BLM to allow it to intervene in the proceeding. BLM granted this petition on July 9, 1979. 1/ On October 17, 1979, BLM called upon MacCracken to describe the circumstances surrounding the filing of her offer and requested a copy of any service agreement between her and Engle. On November 13, 1979, RSC filed this service agreement, dated December 27, 1976, which apparently gave Engle a vested right for 5 years to a specific share in the proceeds of the sale of any lease won by MacCracken.

On December 18, 1979, Geosearch filed an affidavit from Melvin Leslie, Esq., its attorney, asserting that Inexco was not a bona fide purchaser because it should have been alerted to the possibility that MacCracken's lease was defective in view of this Board's holdings concerning other of Engle's clients on August 19, 1977, in Lola I. Doe, 31 IBLA 394 (1977), and on September 12, 1977, in Sidney H. Schreter, 32 IBLA 148 (1977), and should have sought to examine MacCracken's service agreement with Engle. Geosearch asserted that Inexco should be charged with constructive notice of the contents of this agreement, including the interest-creating provision, and so has constructive knowledge that MacCracken had violated the regulations by not disclosing the existence of this interest when making her offer.

On September 30, 1980, BLM concluded that Engle had held an interest in MacCracken's offer at the time she filed it in June 1977; that Engle's unilateral filing of an "amendment and disclaimer" did not alter this fact; that MacCracken's offer violated 43 CFR 3102.7 and 3112.5-2 (1979) because of Engle's interest; that MacCracken had

1/ Janet MacCracken was not named in this petition and thus did not intervene. However, she did file a notice of appeal of BLM's most recent decision and so is a party to the present matter, as BLM's decision adversely affected her by implicitly voiding her retained overriding royalty interest.

assigned her interest in the lease to Inexco before the lease had issued, so that Inexco was not a bona fide purchaser; and that the lease should therefore be canceled. Finally, BLM held that Geosearch was not entitled to any interest in the lease. BLM did not specifically address the overriding royalties retained by MacCracken and RSC, but its decision to cancel the lease in toto also effectively voided these interests. Inexco, RSC, MacCracken, and Geosearch appealed this decision.

We have considered the question of the validity of offers filed by RSC clients in these circumstances many times in the past and have held consistently that they are invalid. Home Petroleum Corp., 54 IBLA 194; 88 I.D. (1981); Estate of Glenn F. Coy, 52 IBLA 182, 88 I.D. 236 (1981); D. R. Weedon, Jr., 51 IBLA 378 (1980); Donald W. Coyer (On Judicial Remand), 50 IBLA 306 (1980); Frederick W. Lowey, 40 IBLA 381 (1979) (appeal pending); Alfred L. Easterday, 34 IBLA 195 (1978); Sidney H. Schreter, supra; Lola I. Doe, supra at 394. We have also affirmed BLM's rejection of offers in which other leasing services held similar undisclosed interests at the time their clients' offers were filed. Gertrude Galauner, 37 IBLA 266 (1978); Marty E. Sixt, 36 IBLA 374 (1978). We adhere to these holdings.

[1, 2] The service agreement in effect at the time Engle filed MacCracken's offer gave Engle an "interest" in this offer. 2/ This interest was not abrogated by Engle's unilateral attempt to disclaim it, as Engle did not communicate this putative waiver to MacCracken or receive any consideration from her to bind the contract. 3/

McCracken failed to disclose this interest at the time she made her offer as required by 43 CFR 3102.7, and it was therefore non-qualifying because it violates this regulation. 4/

[3] The question of whether the Department is estopped from rejecting Engle's client's offers was fully considered in Donald W. Coyer (On Judicial Remand), supra at 313-14. We adhere our holding there that the Department is not estopped to reject these offers.

Similarly, in D. R. Weedon, Jr., supra at 383-84, we considered and rejected the suggestion of Engle and his clients that it is unfair to give retroactive effect to our decision to reject offers such as MacCracken in which Engle had an undisclosed interest. We adhere our holding there and incorporate it by reference herein as well.

2/ Donald W. Coyer (On Judicial Remand), supra at 312; Frederick W. Lowey, supra at 383; Alfred L. Easterday, supra at 198; Sidney H. Schreter, supra; Lola I. Doe, supra.

3/ Donald W. Coyer (On Judicial Remand), supra at 313; Frederick W. Lowey, supra at 384-92; Alfred L. Easterday, supra at 199.

4/ Donald W. Coyer (On Judicial Remand), supra; Gertrude Galauner, supra; Marty E. Sixt, supra; Alfred L. Easterday, supra; Sidney H. Schreter, supra; Lola I. Doe, supra; B. F. Sandoval, supra.

[4] Even though MacCracken's offer was defective, the lease issued pursuant to this offer may not be canceled if it has been assigned to a bona fide purchaser. 30 U.S.C. § 184(h)(2) (1976); 43 CFR 3102.1-2. BLM held that Inexco, to which MacCracken assigned title to lease W 60047, was not a bona fide purchaser, citing Winkler v. Andrus, 494 F. Supp. 946 (D. Wyo. 1980), and it accordingly canceled this lease. We reverse BLM's holding and reinstate the lease.

In order to determine whether Inexco was a bona fide purchaser, it is necessary to examine the state of its knowledge, both actual and constructive, at the time of the assignment. Winkler v. Andrus, 614 F.2d 707, 712 (10th Cir. 1980); Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966). Assignees of Federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment. Winkler v. Andrus, supra at 713; Southwestern Petroleum Corp. v. Udall, supra at 655-56. An assignee is not required to go outside those BLM records relating to the particular parcel of land assigned. Ibid.

We must first consider whether the conclusion is influenced by the date when the assignment occurred. The general rule is that the relevant date is the date that the consideration for the assignment was paid. Winkler v. Andrus, 614 F.2d at 712, citing 77 Am. Jur. 2d, Vendor & Purchaser § 706 (1975). 5/ Nevertheless, the Tenth Circuit stated in Winkler that the critical time was instead when the agreement was formed. However, here, as in Winkler, it is immaterial whether the critical time is regarded as the date the parties agreed to the assignment or the date consideration was paid.

Inexco and MacCracken completed the agreement to assign her offer to lease and lease, if issued, on July 27, 1977. Inexco paid her its consideration for the agreement on July 28, 1977, subject to issuance of the lease and verification of title by Inexco. Throughout the period in question, BLM's records showed MacCracken's DEC to be entirely proper on its face with no indication of, nor means to discover, its actual infirmity at that time. Although the presence of the DEC's of the second and third drawees and the fact that BLM had not yet issued a lease to MacCracken might have given Inexco some reason to speculate that BLM might still reject her offer, there was nothing in the record

5/ The parties in Winkler v. Andrus, 614 F.2d 707, apparently disagreed on whether the relevant date was the date of the assignment agreement or the date of payment of consideration. The Court, while citing the general rule favoring the latter, announced its support for the former, but did not actually have to choose, as it found that the result was the same in either case. Id. at 712. See our discussion of this issue in Home Petroleum Corp., supra.

suggesting that it would have any basis to do so. Her DEC was apparently completely and accurately filled out. Inexco had no way to tell from BLM's file that Engle actually had an undisclosed interest in MacCracken's offer. Moreover, at that time this procedure and the mechanism for implementing it was prescribed by Departmental regulation. 43 CFR 3106.3-4 (1977).

Geosearch contends that Inexco should have known that Engle had an interest in MacCracken's offer, as our decision in Lola I. Doe, supra, issued on August 19, 1977, operated to put Inexco on notice that Engle had undisclosed interests in his clients' offers. We cannot agree.

First, there is no finding in our Doe decision that all of Engle's clients had the same contractual relationship with him, or that all applications filed by him on their behalf were to be regarded as defective.

Second, if Inexco was aware of the Doe decision, it had a right to presume that BLM was aware of it also and was processing offers of RSC clients so as to insure that no other such undisclosed interests were represented by such offers. It is, after all, BLM's responsibility to evaluate and adjudicate lease offers, not Inexco's. Moreover, Inexco had a right to presume that BLM had properly discharged this responsibility in this instance, as there is a legal presumption of regularity which supports the official acts of public officers and the proper discharge of their official duties. United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926).

Third, the Tenth Circuit has held assignees to have only such imputed knowledge of the status of the lease as is contained in the official title records maintained in the BLM office. (It goes without saying, of course, that a purchaser would also be charged with notice of filings in the lis pendens records of the court of competent jurisdiction or matters of record in the county where the land was situated.) Winkler v. Andrus, supra at 713; Southwestern Petroleum v. Udall, supra at 655-56. BLM's case file contained no reference to the Doe decision, nor any indication that the circumstances which were addressed in the Doe case also obtained in this instance.

In its decision and on appeal, BLM argues that Inexco was not a bona fide purchaser under the rule set out and applied in the Winkler, cases. BLM's reliance on this rule here is misplaced, as there, unlike the instant case, BLM's case file gave the would-be bona fide purchaser very good reasons to doubt that he was purchasing a valid lease, both at the time he agreed to purchase and at the time he paid for the interest. His assignor's DEC had been drawn only with second priority, and, while both BLM and this Board had concluded that the first DEC was invalid (Joseph A. Winkler, 24 IBLA 380 (Apr. 29, 1976)), this question

had not been finally resolved as of July 12, 1976 (the date of assignment), or July 26, 1976 (the date the assignee paid for the assignment), because the 90-day statutory time period for filing a petition for judicial review of our decision had not run. Thus, as the assignee was imputed to have had constructive knowledge both of the 90-day appeal period and of the contents of BLM's file, he knew that litigation about the validity of the superior first DEC was still in prospect and that this priority interest could be invalidated. Accordingly, he could not have taken the second priority interest without some uncertainty as to its validity, and so did not qualify as a bona fide purchaser, either on the date of the agreement or when he paid the assignor. Winkler v. Andrus, 494 F. Supp. at 949. At all times during the assignment negotiations, BLM's record advised the purchaser of a climate of adversity surrounding the interest he was purchasing. As discussed above, the present case is quite different.

BLM attempts to analogize Winkler to the present situation, stressing that here, as in Winkler, the validity of the assigned interest had not yet been finally established at the time of the assignment. It argues that a challenge to the validity of MacCracken's offer was still possible even after the lease issued, because the second and third drawees could have protested the issuance of the lease to MacCracken or could have appealed the rejection of their offers. 6/ We do not think that the rule in Winkler extends so far as to dictate that one may not purchase an oil and gas lease interest in good faith simply because there is a possibility that someday the validity of the lease might be subject to challenge. As discussed above at n.6, one may never be entirely sure that a protest will not be filed against a lease, even long after it is

6/ We note two pertinent practical difficulties with this argument. First, there is no specific time period within which to protest. For instance, Geosearch waited over a year from the date of issuance of the lease to protest on behalf of the second drawee. Second, BLM did not routinely reject and return second and third DEC's in 1977, and did not start doing so until recently. For example, in this case, BLM did not reject the second and third offers until over 3 years after issuance of the lease. Moreover, we believe that there are hundreds of active oil and gas leases issued under the DEC system in which BLM has never rejected these second and third DEC's. In these circumstances, the effect of adopting BLM's suggestion would be that no assignee of any of these hundreds of leases could be a bona fide purchaser, as BLM's records would have shown the assignee that it was still possible for the second or third drawee to protest the validity of the lease, because their offers were still extant, and because there is no deadline for protesting. This result is clearly at odds with the congressional purpose in enacting the bona fide purchaser provision, as it would virtually eliminate this protection and throw lease ownership into chaos.

issued. See, e.g., Beard Oil Co., 1 IBLA 42, 77 I.D. 166 (1970) (protest was filed 4 years after issuance). Accordingly, we hold that in the absence of a climate of adversity surrounding the interest which is evident from BLM's records, such as was present in Winkler, or other evidence of disqualification, one may be a bona fide purchaser even where the validity of the lease might be subject to some future attack. That is, if there is nothing in the record suggesting that an adverse claim may prevail, and no other evidence of irregularity the lease interest may be purchased in good faith. This is particularly true where, as here, the assignee's purchase of the offer was expressly contemplated by the Departmental regulations governing assignments. 43 CFR 3106.3-4; see Barbara J. Niernberge (concurring opinion), 53 IBLA 112, 119-21 (1981).

Nor are we persuaded by Geosearch's argument that Inexco should have known of the defect in MacCracken's offer because the use of a common address on the DEC put Inexco on notice that it was dealing with a filing service and that it was likely that the service had an interest in the DEC, as it would not represent a client "on a 'gratis' basis." The mere use of a filing service is not illegal, and there are ways by which a service may represent its clients without having an interest in their offers. See e.g., Kelley Everette, 41 IBLA 155 (1979); Geosearch, Inc., 40 IBLA 401 (1979). Knowledge that a filing service has been used does not put one on notice that a lease is defective. Accordingly, we do not impute to Inexco constructive knowledge of the defect in MacCracken's DEC, and, in the absence of a showing that it had actual knowledge of this fact, we conclude that it was a bona fide purchase of her interest.

On remand BLM should reject and return the DEC's of Yole Antongiovanni and D. A. Mastorakos which were drawn with second and third priority, respectively, in the July 1977 drawing. This should have been done when the lease issued to MacCracken. BLM draws DEC's with subordinate priority in order not to have to relist a parcel for offers if the first DEC is rejected. Estate of Glenn F. Coy, supra at 194-95, 242; Geosearch Inc., 51 IBLA 59, 61 (1980). In the instant case, the lease has been issued to a senior offeror, and this lease may not now be canceled because of any defect in that senior offer, because the lease has been assigned to a bona fide purchaser. In these circumstances, the second- and third-priority DEC's are properly rejected, as there is no longer any interest at stake to which they apply. See Geosearch, Inc., 41 IBLA at 293.

[6] The retained overriding royalty interests held by MacCracken and Engle are voidable and must be canceled. Where an offeror has filed a DEC which violates 43 CFR 3102.7 because it does not contain the names of all parties in interest; where BLM, not knowing of this defect, has issued a lease to the offeror; and where the lessee has assigned the lease to a bona fide purchaser and retained an overriding royalty interest, BLM, upon discovering the defect in the

offer, properly cancels the overriding royalty interest retained by the offeror. Home Petroleum Corp., supra, Wayne E. DeBord, 50 IBLA 216 n.1, 87 I.D. 465 (1980) (appeal pending). It is entirely proper to deny both MacCracken and Engle (RSC) a share in any benefit which may result from production on this lease. MacCracken failed to comply with the sole party interest requirement, and Engle took an assignment of a portion of the interest which MacCracken retained with full knowledge of the defect in MacCracken's DEC, as Engle himself held the objectionable interest.

Engle and MacCracken challenge the Department's authority to cancel their overriding royalty interests. The regulations require that any underlying interest in a lease be canceled or forfeited to the Government where the interest was acquired in violation of governing provisions, notwithstanding the fact that there may be other valid interests in the same lease which are not subject to cancellation. 43 CFR 3102.1-2(b). This provision is adopted directly from the governing section of the Mineral Leasing Act, as amended, 30 U.S.C. § 184(h)(2) (1976), as part of the long-recognized Departmental authority to cancel leases administratively for violation of the Mineral Leasing Act. Boesche v. Udall, 373 U.S. 472 (1963). In McKay v. Wahlenmaier, 226 F.2d 35 (C.A.D.C. 1955), the D.C. Circuit held that the Secretary must cancel an oil and gas lease interest acquired in violation of a Departmental regulation.

Having canceled these underlying overriding royalty interests, on remand BLM should comply with the terms of 43 CFR 3102.1-2(b) and sell these interests as provided therein.

This decision comports with our holding in Home Petroleum Corp., 54 IBLA 194, 88 I.D. (1981), issued on April 24, 1981.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is reversed and remanded for further proceedings in accordance herewith.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge